TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

THE PETITION OF DONATTO FILLIPPON FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO BRING BEFORE THE SUPREME COURT THE CASE OF DONATTO FILLIPPON, PLAINTIFF-IN-ERROR, AND APPELLANT,

AGAINST,

ALBION VEIN SLATE COMPANY, DEFENDENT-IN-ERROR, AND APPELLEE,

RESPECTFULLY SHOWS to this Court as follows:

FIRST: That your petitioner at the time of the Commencement of the suit was a citizen of the Kingdom of Italy and a subject of the King of Italy and the defendant and respondent was at that time a corporation duly organized and existing under the laws of the State of Pennsylvania.

SECOND: That on or about the 31st day of July, 1914, the Albion Vein Slate Company was engaged in the mining and quarrying of slate and slate products and operated a slate quarry near the Borough of Pen Argyl, in the County of Northampton, State of Pennsylvania, United States of America, and employed Donatto Fillippon as a rubbish hand.

THIRD: That the Albion Vein Slate Company on the 31st day of July, A.D., 1914, carelessly and negligently employed methods, means, instrumentalities and machinery not in common and ordinary use but more dangerous than those in common and ordinary use, failed to furnish a reasonably safe place for the said Donatto Fillippon to work and by its foreman directed the said Donatto Fillippon to place a wedge under a block of slate, which though not immediately and imminently dangerous, threatened such danger that the said Donatto Fillippon demurred and stated his fears as to the threatened danger and proceeded to procure a stick for the purpose of pushing the wedge under the slate, whereupon the foreman gave him imperative orders and directions to put the wedge under the block of slate with his hand when the block tilted and crushed the right arm of Donatto Fillippon above the elbow which necessitated the amputation of the arm, thereby permanently disabling the said Donatto Fillippon and preventing him from earning a livelihood for himself and resulting in great pain and suffering to the damage of said plaintiff.

FOURTH: That on the 10th day of May, 1915, a praecipe for summons in trespass was filed for and on behalf of Donatto Fillippon against the Albion Vein Slate Company in the office of the Clerk of the District Court of the United States for the Eastern District of Pennsylvania, and the same day a summons in trespass issued out of said court returnable the first Monday of June next, and a statement of claim for $10,000 damages with rule to plead was filed. Subsequently, the writ of summons was returned, served and filed.

FIFTH: That on the 19th day of April, 1916, the plea of "Not guilty" was filed in the Office of the Clerk of the

District Court of the United States for the Eastern District of Pennsylvania on behalf of the defendant company and the case ordered on the trial list without any further affidavit of defense or answer filed to the statement of claim.

SIXTH: That on the 9th day of October, A. D., 1916, the above suit came on for trial before the Honorable Charles B. Witmer, District Judge for the Middle District of Pennsylvania, specially presiding, and a jury being called on the same day, returned a verdict in favor of the defendant on the 10th day of October, 1916.

SEVENTH: After retiring for deliberation, the jury or some member thereof, sent from the jury room to the Judge in Chambers, the following written note:

> "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence even though told by Foreman Davis to 'push it under'."

Without calling the jury into open court and without notifying counsel who were in court, the Trial Judge sent the following written instruction to the jury room from Chambers:

> "If he was told to push it under, as stated by the plaintiff, and he did so, fully appreciating at the time the danger attending, and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the danger known to him, and apparent, he is guilty of contributory negligence."

EIGHTH: That on the 13th day of October, A.D., 1916, a motion and the following reasons for a new trial were filed:

(*a*) That it was error for the trial judge to send secret instructions to the jury not in open court and without notifying counsel, and

(*b*) That the instructions in themselves were erroneous.

NINTH: That on the 30th day of October, 1916, bills of exceptions were allowed and filed to the action of the court in giving the instructions to the jury, not in open court, without notifying the parties or their counsel, as well as to the substance of the instructions, which said bills of exceptions were sealed by order of the Court, dated November 3, 1916.

TENTH: That on the 6th day of December, 1916, the Trial Judge filed an opinion denying the motion for a new trial and on the 21st day of December, judgment was entered on the verdict.

ELEVENTH: That on the 18th day of January, 1917, a petition for writ of error was filed, which was allowed by the said Honorable Charles B. Witmer, District Judge for the Middle District of Pennsylvania, specially presiding: and on the same day the following were filed: The assignments of error; bond for costs sur writ of error; order of court approving bond sur writ of error and a copy thereof lodged in the Clerk's Office for adverse party, and on the same day a citation was allowed and issued and it was ordered that a certified transcript of the record of the proceedings in said case be filed, which said citation was on the 20th day of January, 1917, returned, service

accepted and filed, and the record duly transmitted to the Circuit Court of Appeals for the Third Circuit.

TWELFTH: That a certified transcript of the record and of all proceedings in the case was duly so transmitted to the United States Circuit Court of Appeals for the Third Circuit and on or about the 16th day of March, A. D., 1917, the appeal by your petitioner from the judgment so as aforesaid entered upon the verdict for the defendant came on to be heard and was argued by counsel for all parties before Judges Buffington, McPherson and Woolley, and thereafter on the 17th day of May, 1917, said Court of Appeals rendered and filed an opinion and decision written by Judge McPherson, which among other things held that the instructions given by the Trial Judge in the form of a note sent from Chambers to the Jury Room without notifying counsel were not erroneous, and that it was not error for the Trial Judge to hold private communication with the jury after the jury had retired and to give instructions not in open court to the jury without notifying counsel, particularly if the subject of the instructions was preserved and made a part of the record. Said opinion and decision affirmed the judgment of said District Court.

THIRTEENTH: The questions and propositions of law involved in this case are substantially as follows:

(*a*) Whether the court erred in giving private instructions to the jury in the form of a written note and sent to the jury by the Court in Chambers while the jury was deliberating without the consent of plaintiff or his counsel who were in court at the time and which instruction was not given in open court.

(*b*) Whether the court erred in the substance of the instructions sent to the jury room in answer to the question propounded to the court by the jury in writing.

FOURTEENTH: That the questions and propositions of law involved under subdivision (*a*) of the foregoing paragraph were raised flatly in the case before the Circuit Court of Appeals for the Eighth Circuit and decided contrary to the decision of the Circuit Court of Appeals for the Third Circuit in the present case.

FIFTEENTH: That the questions and propositions of law involved under subdivision (*a*) were also raised in the Circuit Court of Appeals for the Sixth Circuit in a case decided by the Supreme Court of the United States. Both the Supreme Court of the United States and the Circuit Court of Appeals for the Sixth Circuit indicated that instructions to the jury had to be delivered in open court unless waived by the consent of the parties or their counsel.

SIXTEENTH: That the Supreme Court of Pennsylvania in a number of decisions decided that all instructions to the jury must be given in open court where they may be heard by the parties and their counsel, the State of Pennsylvania being in the district and circuit in which the cause of action originally arose and in which it was tried.

SEVENTEENTH: And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons among others:

1. Because the Circuit Court of Appeals of the Eighth Circuit has held that it is error to deliver instructions to a jury not in open court, which is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case under consideration.

2. Because the Circuit Court of Appeals for the Sixth Circuit has indicated by its decision that all instructions to the jury must be in open court which is contrary to and in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case under consideration.

3. Because the affirmance and approval of the practice of giving private instructions to the jury not in open court is at variance with the law as indicated by the opinion of the Supreme Court of the United States that instructions to a jury must be given in open court.

4. Because the questions of law involved herein have not been directly passed upon by your Honorable Court.

5. Because the public interest and the interests of jurisprudence require the decision of this court upon the question of law involved herein, particularly with reference to the general rule of practice whether instructions to the jury can be given otherwise than in open court.

6. Because there is a conflict in this respect between the law as expounded by the Circuit Court of Appeals for the Third Circuit in the case under consideration and the rule observed and laid down by the Circuit Courts of Appeals in other Circuits and the rule observed and recognized by the Supreme Court of the United States, as well as by the highest appellate courts of the

State of Pennsylvania held in the said district and circuit with reference both to the rule of practice and the substance of the instructions.

7. Because the opinion of the Circuit Court of Appeals for the Third Circuit in the case under consideration is in conflict and at variance with the rule observed and laid down by a majority of the appellate state courts of other states.

8. Because for the sake of uniformity of decisions, the Supreme Court of the United States should declare the rule of practice with reference to the giving of instructions to juries not in open court and not in the presence of counsel.

WHEREFORE, Your petitioner prays that your Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals to the Third Circuit to bring up this case to this Honorab Court for such proceedings as to this Honorable Cour may seem just.

DONATTO FILLIPPON.

EASTERN DISTRICT OF PENNSYLVANIA } ss.
THIRD CIRCUIT.

Donatto Fillippon, being duly sworn, says: I have read the foregoing petition. The same is true to my knowledge, information and belief; my knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the court in which this action has been heard.

DONATTO FILLIPPON.

Sworn to before me
this 31st day of
July, A.D., 1917.

HELEN M. GOULD.

Notary Public, Easton, Penna.
Commission expires Feb. 19, 1921.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well-founded and that the case is one in which the prayer of the petitioner should be granted by this court.

CALVIN F. SMITH.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

IN THE MATTER OF PETITION OF DONATTO FILLIPPON FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO BRING BEFORE THE SUPREME COURT THE CASE OF DONATTO FILLIPPON, PLAINTIFF, IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PLAINTIFF-IN-ERROR AND APPELLANT IN THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

AGAINST

ALBION VEIN SLATE COMPANY, THE DEFENDANT IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DEFENDANT-IN-ERROR AND APPELLEE IN THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER SUR PETITION FOR WRIT OF CERTIORARI.

Donatto Fillippon petitions the Supreme Court of the United States in this case for writ of certiorari on the ground that the case involves a matter of great general importance and involves the great principle in American jurisprudence whether trial by jury shall

remain as heretofore and whether the deliberations of the jury, after retiring to the jury room, are to be inviolate or whether they are to be subject to secret instructions from the trial Judge in Chambers, not in open court, without the presence and without the knowledge of counsel at the time when the instructions were sent, although parties and counsel were present in court at the time. It involves the great principle of American liberty, whether a man whose life, liberty or property is at stake shall have the right of a fair and impartial trial by jury in open court with the right to be at all times represented by counsel during the trial from beginning to end, so that after the trial is over the defeated litigant can feel that there was nothing suspicious in the trial and not only that he did not know of anything suspicious.

The trial Judge in the case under consideration, in reply to a question pertaining to the law of the State of Pennsylvania, to which his reply would have to be "no" if answered in the form submitted to him, by adding qualifications to the answer and by interjecting elements into the question which were immaterial and have never been recognized either in this state or anywhere else as entering into the question of determining whether the plaintiff as a matter of law was prevented from recovering by his own contributory negligence, answered the question in the affirmative.

We further respectfully submit that in this case the necessity of avoiding conflict between decisions of the following courts of appeal, to-wit: the Supreme Court of the United States, the Circuit Court of Appeals for the Eighth Circuit, the Circuit Court of Appeals for the Sixth Circuit and the Supreme Court of Pennsylvania,

which is the highest state court of appeals in the State of Pennsylvania, as against the decision in this case in a matter affecting the interest of the people as a whole, demands the exercise by your Honorable Court of settling this important question by a decision of the highest court of the nation.

This doctrine was laid down by your Honorable Court in the case of Forsyth *vs.* City of Hammond, 166 U. S. 506, 41 L. Ed. 1095, where in an opinion by Mr. Justice Brewer the rule is enunciated as follows:

> "We re-affirm in this case the propositions heretofore announced, to wit: that the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendancy, provided the case is one which but for this provision of the statute would be finally determined in that court, and further that while this power is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between the courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

In line with the language of Mr. Justice Brewer, as reiterated, the policy of your Court in exercising its right to issue writs of certiorari but sparingly unless those compelling reasons, to-wit: the necessity of avoiding

conflict between two or more courts of appeals, or between courts of appeal and the courts of a state, or a question not merely private but affecting the whole matter of jurisprudence for the whole nation, we respectfully submit that the matter which is brought to the attention of your court by the petition for a writ of certiorari, presents at least two of those compelling reasons. First: a conflict between two or more courts of appeal, Federal and State, and Second: a conflict between a federal court of appeals and the highest appeal court of the State of Pennsylvania, coupled with a matter of such prime importance to the whole nation as the preservation of the jury room from outside influence and communications. The jurisdiction of the Federal Courts in this case rested entirely on the diversity of the citizenship of the plaintiff and defendant and, therefore, an appeal did not lie from the circuit court of appeals, and but for a writ of certiorari the petitioner would be without remedy.

The argument as contained in this brief will be divided into two main questions. The first is,

1. Did the trial Judge err in giving written instructions to the jury after the jury had retired to deliberate, not in open court, nor in the presence of the parties or their counsel and given with their knowledge?

2. Were the instructions erroneous?

It is with reference to the former question that we claim there is a conflict in decisions of the Circuit Court of Appeals by the Judges of the Third Circuit in the case under consideration differing and deciding contrary to the decisions of the Circuit Court of Appeals of the Sixth

Circuit and the Circuit Court of Appeals of the Eighth Circuit, as well the doctrine of the Supreme Court on the same subject, and as also differing and being in conflict with the decisions of the Supreme Court of Pennsylvania which is the highest appellate court in the State of Pennsylvania, as well as the decisions of most of the other states. The Circuit Court Judge McPherson of the Third Circuit in his opinion on the question of whether it was error for the trial Judge to give written instructions in answer to a request from the jury not in open court and not in the presence of, nor with the knowledge of counsel then present in open court, states in his opinion, as follows:

> "Upon this subject the federal courts have not yet passed, as far as we know, but numerous cases have arisen in the state courts and have resulted in two divergent lines of decision. The authorities are collected in a note to North Dakota *vs.* Murphy, 17 L. R. A. (N. S.) 609 (1909), and we see no need to add a prolonged discussion to the 50 or more opinions already in the books. Numerically, the opposing cases are fairly equal, and in weight of argument also there is little to choose between them."

We respectfully submit that the learned Circuit Judge who wrote the opinion evidently overlooked certain portions of the brief for the plaintiff-in-error submitted at the time of the argument of the case before the Circuit Court of Appeals for the Third Circuit, because special attention was called in the brief to the decision of the Circuit Court of Appeals for the Sixth Circuit in Yates *vs.* Wheyl Coke Company, 221 Federal Reporter, 603, as well as the opinion of the Circuit Court of Appeals for the Eighth Circuit in Aerheart *vs.* St. Louis I. M. &

S. Ry. Co., 99 Federal 907, as well as the opinion of Mr. Justice Gray in Stewart *vs.* Wyoming Ranch Co., 128 U. S. 383 (32 L. Ed. 439) and the printed brief submitted at the time contained copious extracts from the opinions on this very question. The learned Circuit Judge who wrote the opinion of the Circuit Court of Appeals for the Third Circuit also evidently forgot during the time that intervened between the time of the argument and the time of writing the opinion that a special effort was made to bring the decisions in the above cases to the attention of the court at the time of argument. When the learned judge of the Circuit Court of Appeals further refers to the numerical equality of the two lines of cases as given in the footnote of North Dakota *vs.* Murphy, 17 L. R. A. (N. S.) 609, we also must differ as to any numerical equality existing or anything near a numerical equality. We concede that the decisions of the state courts of the State of New Hampshire and Virginia are at variance with all the rest but we will not concede that there is anything like any equality numerically. Not that we are contending that your Honorable Court or any other appellate court should erect for themselves scales and throw all the decisions into one side or the other of the scale and thereby decide which line of cases to follow, because it is a question of reasoning and justice that we are trying to present and impress on this court and not a question of arithmetic.

The only case that we have been able to find in which the question was raised before the Supreme Court of the United States was the case of Stewart *vs.* the Wyoming Ranch Co., 128 U. S. 383, (32 L. Ed.) 439, where in an opinion by Mr. Justice Gray the question is referred to as follows:

"The remaining objection argued is to an instruction given by the judge to the jury in response to a question asked by them upon coming into court after they had retired to consider their verdict. It is a conclusive answer to this objection, that no exception was taken to this instruction at the time it was given, or before the verdict was returned. The fact that neither of the counsel was then present affords no excuse. Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions. The absence of counsel, while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record."

It will be noted that in this particular case the instructions were given in open court. Counsel were not present at the time the instructions were given, but particular attention is called to the fact that the language of the learned judge limits the power and duty of the trial Judge to instruct the jury in "open Court."

The question was flatly raised before the Circuit Court of Appeals for the Eighth Circuit in the case of Aerheart *vs.* St. Louis I. M. & S. Ry. Co., 99 Federal Reporter 907. The Circuit Judges who heard the case were Cladwell, Sanborn and Thayer, and in the opinion by Circuit Judge Thayer, we have the following:

"The practice of sending written instructions to the jury room, or holding other written communication with the jury, after they have retired to consider their verdict, without knowledge of counsel for the respective parties, has been condemned in numerous well considered cases and has only been upheld in a few instances. Chouteau *vs.* Iron Works, 94 Mo. 388, 7 S. W. 467; State *vs.* Patterson, 45 Vt. 308; Bank *vs.* Mix, 51 N. Y. 558; O'Connor *vs.* Guthrie, 11 Iowa, 80; Campbell *vs.* Beckett, 8 Ohio St. 210; Hobert *vs.* State, 3 Minn. 262 (Gil. 181). See contra Bassett *vs.* Manufacturing Co., 28 N. H. 457; Goldsmith *vs.* Solomons, 2 Strob. 296. It will accordingly be conceded that such practice is erroneous, and ought not to be sanctioned."

The question was recently raised in the case of Yates *vs.* Wheyl Coke Company, 221 Federal Reporter 603, before the Circuit Court of Appeals for the Sixth Circuit, Judges Knappen, Denison and Sater, where in an opinion by District Judge Sater, sitting as the Court of Appeals for the Sixth Circuit, it was held:

"A trial court should avoid instructing a jury in the absence of counsel for the respective parties, when it can conveniently do so, and especially where the supplemental charge covers propositions of law not dealt with by the original charge; but the rule which controls is thus stated by Mr. Justice Gray in Stewart *vs.* Wyoming Ranch Co., 128 U. S. 383, 390, 9 Sup. Ct. 101, 104 (32 L. Ed. 439): 'the absence of counsel, while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the

> law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record'."

It will be noted that in the latter case, as well as in the case of Stewart *vs.* Ranch Company, supra, the instructions were given in open court, but not in the presence of counsel and while it was held that this was not error, the power and duty of the judge to instruct the jury is limited entirely to the open court and is not extended either by Mr. Justice Gray or by District Judge Sater to the jury room by written communication, and it is conceded by Circuit Judge Thayer that it is erroneous to give such instructions.

We will next pass to the conflict between the decision of the Circuit Court of Appeals for the Third Circuit as ennunciated by Circuit Judge McPherson and the Supreme Court of the State of Pennsylvania, and will then pass to the various cases decided by the highest courts of appeal of other states.

The question of private communications, not in open court, by the Court to the jury in the line of further instruction seems to have been brought to the attention of the Appellate Court of Pennsylvania for the first time in Earon *vs.* Mackey, 106 Pa. 452, and in this very case the distinction which the Court makes in the opinion refusing a new trial is shattered at once. In Earon vs. Mackey, supra, the question which the jury asked and the instructions which the Court gave were preserved, but unfortunately there was no bill of exceptions to the action of the Court. The Supreme Court of Pennsylvania condemned the practice, and stated its position with

reference to a communication not made in open court as follows:

> "It is irregular and erroneous for the Court to send instructions to the jury during their deliberations and in answer to their request for information, the jury being in their room and not in the presence of the Court."

And Mr. Justice Sterrett, with reference to this question, states as follows in the opinion on page 457:

> "There is nothing in the record on which to base the second specification of error. The depositions taken on the motion for a new trial are no part of the record. It does appear, however, in a note appended by the learned Judge to his charge that after being out all night the jury, in a paper signed by their foreman, asked a question, which was answered by the Court in the affirmative, but he does not say the answer was conveyed by tipstave. If it was so communicated to the jury not then in the presence of the Court, the proceeding was irregular and erroneous, but we can take no notice of any fact or circumstance that occurs during the deliberation of the jury unless it is regularly brought to our attention by bill of exceptions."

We respectfully submit that the gist of the impropriety does not lie in the bare communication or in its substance, but it lies in the communication in the form of instructions being made, not in open court. That this is so is plainly apparent from the syllabi in Sommer *vs.* Huber, 183 Pa. 162, where it was held as follows:

"Instructions to the jury must be given in open court, where they may be heard by the parties and their counsel."

"It is error for the trial Judge, in the absence of the parties and their counsel, to send written instructions to the jury after they have retired, although sent in answer to a written request from the jury for instructions."

This case was reversed on this specific ground, and from the extract of the arguments of counsel it would appear that appellee's counsel urged the same argument which the Court below adopted as its reason for justifying the communication, but in spite of this, the Supreme Court reversed on the ground "of an unwarranted departure from the rule which condemns secret instructions to the jury in relation to questions raised by the pleadings or the evidence as opposed to the proper administration of justice."

The question was again raised in Pennsylvania in Commonwealth *vs.* House, 6 Pa. Super. Ct. 92, where the Superior Court of Pennsylvania in an opinion by President Judge Rice reviews the authorities as follows:

"Unquestionably the Court has discretionary power, of its own motion, to recall the jury and give them further instructions, or withdraw or correct erroneous instructions. As far as we are informed, the usage of the courts of the Commonwealth has been to give such additional instructions only in open court, and this is the safer and the better practice. At all events, this much is established by the overwhelming weight of authority, that it is re-

versible error to give them after the adjournment of court in the absence and without the knowledge of the parties or their counsel: McNeil *vs.* State, 47 Ala. 498; Collins *vs.* State, 33 Ala. 434; Wade *vs.* State, 12 Ga. 25; Fisher *vs.* People, 23 Ill. 283; Crabtree *vs.* Hagenbaugh, 23 Ill. 349; Fish *vs.* Smith, 12 Ind. 563; O'Connor *vs.* Guthrie, 11 Iowa, 80; Sargent *vs.* Roberts, 18 Mass. 337; Merrill *vs.* Nary, 92 Mass. 416; Read *vs.* Cambridge, 124 Mass. 567; Benson *vs.* Clark, 1 Cow. 258; Moody *vs.* Pomeroy, 4 Den. 115; Taylor *vs.* Betaford, 13 Johns. 487; Bank *vs.* Mix, 51 N. Y. 558; People *vs.* Maurer, 43 N. Y. 1; Hobert *vs.* State, 3 Minn. 262; Kirk *vs.* State, 14 Ohio, 511; State *vs.* Patterson, 45 Vt. 308.

"Against this weight of authority (quoting from the opinion of Mr. Justice Gray in Read *vs.* Cambridge, supra), the only cases brought to our notice which countenance a different rule are two in New Hampshire and one in South Carolina, and in the latter the point adjudged related only to instructions as to the form of the verdict given by the Judge to the foreman in open court; and the criticism upon the judgment of this court in Sargent *vs.* Roberts (18 Mass. 337) was based upon the singular theory that the intercourse between the jury and the Bench is so confidential that often communications from the jury ought not to be disclosed to the bar."

The judgment in Com. *vs.* House, supra, was also reversed, and it may be added that the written question and the written instruction to the jury were known and made a part of the record.

The universal rule adopted by the appellate courts

of New York is that any communication, whether material or not, prejudicial or not, nullified the verdict if not made in open court without the consent of the parties or their counsel, and while it is a fact that there is one case, Thayer *vs.* VanLeet, 5 Johns. 111, to the contrary, this case was overruled subsequently in Taylor *vs.* Betsford, 13 Johns. 487; Moody *vs.* Pomeroy, 4 Denio, 115; Watertown Bank *vs.* Mix, 51 N. Y. 558, and Neil *vs.* Abel, 24 Wend. 185.

In Crabtree *vs.* Hagenbaugh, 23 Ill. 149, sc. 76 Am. Dec. 694, it was held by the Supreme Court of Illinois that the policy of the law requires that all proceedings should be open and notorious, and that the losing party should not be obliged to go to the inconvenience of offering proof that even an error had been committed.

In Danes *vs.* Pearson, 6 Ind. App. 465, 33 N. E. 976, it was held by the Appellate Court of Indiana that a communication between the Court and jury is improper and nullifies the verdict, even though the communication is harmless in itself.

In the case of Sargent *vs.* Roberts, 1 Pickering, 337, which is considered the leading case on this subject, the Appellate Court admits that the practice of the trial Judge communicating with the jury not in open court and without the presence of the parties, was so long established that nobody questioned its impropriety and was a practice which he had indulged in often himself, but proceeded to denounce and condemn the practice and reversed the judgment, and in doing so said it should no longer continue. It might also be added that the communication in that case was preserved so it could be known exactly what was communicated.

In Mier *vs.* Morgan, 82 Wis. 289, 52 N. W. 174, the highest Appellate Court of Wisconsin held as follows:

> "But whether counsel be present or not, if the jury are to be further instructed, they should be brought into open court. The rule is strict, but salutary. All court proceedings should be in the open.....Nor should a defeated party be required to show that such a communication as here had was in fact prejudicial. He is in fact entitled to have his case tried in open court from start to finish. There is safety from no other rule."

In the case of Cook *vs.* Green, 6 N. J. L. 109, the Judge called upon the attorneys to go with him to the jury room for the purpose of giving further instructions, in answer to a request from the jury. The counsel refused, and the Appellate Court held that the giving of such further instruction was not error, because he did not do it secretly, nor did he hold private conferences with the jury, and that if he had not notified the parties or their counsel, then it would have been such an outrage upon the essential forms of the trial as to vitiate the proceedings.

In Chicago, etc., *vs.* Robins, 43 N. E. 332, the request of the jury and the answer of the Judge were preserved, but the Appellate Court of Illinois held:

> "The more important and serious matter, however, is that the jury were not brought into open court."

In O'Connor *vs.* Guthrie, 11 Iowa, 80, the Judge, in answer to an inquiry in writing from the jury, in the same manner, sent by the bailiff, an instruction material

to the determination of the case, and this was done without the knowledge of either party. The Court reversed the judgment, and held that further instructions given to the jury had to be given in public and in open court, so that an opportunity may be afforded the parties to know what instructions were given and ask for such other explanation of the instructions as may be deemed necessary.

In Lowe *vs.* Freeman, 117 Ind. 341, sc. 20 N. E. 242, there were questions propounded by the jury to the Judge after retiring and the Court wrote on the communication from the jury and returned it to them, and while the instruction was proper, the Appellate Court held in reversing the judgment that it should have been given by calling the jury into open court.

In Greely *vs.* Weaver, 5 Atl. 267, the Appellate Court of Maine held that the Court has no right to send an answer to the jury to a question propounded to him in writing by the jurors after they have retired to deliberate on their verdict, without the consent of counsel.

In Hopkins *vs.* Bishop, 91 Mich. 328, sc. 51 N. W. 902, it was held by the Appellate Court of Michigan that it was error for the trial Court to send additional instructions to the jury room in response to a written request from the jury without the knowledge of the parties litigant and without giving them an opportunity of being heard.

In Choteau *vs.* Jupiter Iron Works, 94 Mo. 388, sc. 7 S. W. 467, the Appellate Court of Missouri held that all instructions should be read to the jury and in open court, and where after retiring, the jury desires further

instructions on the law of the case it should be brought into court to receive such further instruction, and if in answer to a request further instructions are sent to the jury by the bailiff in charge, the records should show the consent of the parties to this procedure.

The Court in this case particularly calls attention, like President Judge Rice, in the case of Commonwealth *vs.* House, supra, to the fact that the courts of New Hampshire and South Carolina hold to a different rule and are the exceptions.

Is it not singular that the trial Court, in order to justify its action in giving private instructions to the jury not in open court, and upon which the trial Judge bases his opinion for the refusal of a new trial, resorts to a New Hampshire case and also a case in 20 Missouri Appeal Reports, the decision in which case must have long preceded the case of Choteau *vs.* Jupiter Iron Works, supra, which is found in 94 Missouri, 388?

In the case of Martin *vs.* Martin, 76 Nebr. 335, sc. 107, N. W. 580, the Appellate Court of the State of Nebraska held that it was error for the Court, after the jury had retired, to return an answer to a written communication from them without bringing them into court.

In the case of Mosley *vs.* Washburn, 165 Mass. 417, which is the only case that seems to differ from the universal trend of opinion in that State, the reason stated for the deviation from the general rule is that the only communication sent to the jury was with reference to the computation of interest and the Appellate Court held that since the interest was a mere matter of computation and which the Court could direct the jury to

calculate after they had returned a verdict in favor of the plaintiff without calculating the interest, therefore, the error was of such a nature as would not be held to vitiate the verdict.

In the case of Texas Midland Railroad *vs.* Byrd, 115 S. W. 1163, the Texas Supreme Court held that it is reversible error for the Judge to communicate with the jury otherwise than as provided by law, as by holding conferences with the foreman not in open court and in the opinion by Chief Justice Gaines, a number of cases are cited for the proposition set forth in the syllabus hereinbefore stated. All the authorities, both for and against the proposition, are collected in the note of State *vs.* Murphy, 17 L. R. A. (N. S.) 609, from which it will appear that the exceptions are the cases cited by the learned Court below as a basis for refusing a new trial and we respectfully submit that no matter what the practice may be in New Hampshire and in an isolated case in Virginia and Missouri, it seems that the Federal Courts of this country have recognized the same principle which we are contending for, to-wit: that any additional instructions given to the jury after the jury have started to deliberate must be in open court and even though they can be given without the presence of the parties or their counsel, the failure to give such instruction in open court admits of no exception.

The second question, to-wit: whether the instruction given in writing to the jury not in open court after retiring for deliberation in answer to a note from someone in the jury room, arises as an incident in the matter of a petition for a writ of certiorari. If our right to a writ of certiorari was based entirely upon the substance of the instruction we could only urge that the instruction sent

by the trial judge to the jury room not in open court was in conflict with the rule laid down by the Supreme Court of Pennsylvania in cases of this kind, and that the rule so in conflict with the highest appellate court of the state in which it was tried was subsequently affirmed by the Circuit Court of Appeals for the Third Circuit thereby constituting a conflict in the law pertaining to negligence and contributory negligence as ennunciated by the Supreme Court of the State when an employee is working under the direct eye and instruction of the master and obeys the orders and instructions of the master after voicing his doubt as to the propriety and the imminence of the danger to be encountered by following his master's instructions. The question that was presented in the written note to the Judge in Chambers was as follows:

> "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand and having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by foreman Davis to 'push it under'."

We feel safe in saying that the answer to this question in any state in this Union would have been "No," because the facts as embodied in the question would not make the employee guilty of contributory negligence as a matter of law, but it was one of the questions that had to be submitted to the jury for decision. That it is so is clearly held in 29 Cyc. 640, where the general rule is laid down as follows:

> "The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as a matter of law but the question should be submitted to the jury."

Instead, however, of answering this question in the only way in which it could be answered as stated, the court adds a lot of elements, qualifications and conditions and by adding those qualifications, elements and conditions the court was enabled to answer the question in the affirmative instead of the negative and in this we say the injury to the plaintiff consisted. We respectfully submit that if this instruction had been given in open court in the presence of counsel we could have called to the attention of the court and could have requested the court to charge on this point in the language and according to the authorities of the State of Pennsylvania.

An analysis of the answer creates just a suspicion that it was framed with desire to answer in the affirmative. The learned trial judge starts out in his answer, "If he was told to push it under, as stated by the plaintiff, and he did so," there is not much question that this was done, and in fact, this was assumed in the question sent by the jury. The learned trial judge continues further and states "fully appreciating at the time the danger attending," that much also was assumed in the question and therefore did not require any repetition. The learned trial judge then continues, "and having sufficient time to consider." It is hard to understand what difference it would make if a man had sufficient time to understand if he already appreciated the danger. It cannot be assumed that he could get any enjoyment out of musing and meditating upon a danger with which he was already fully acquainted and sufficient time to consider the danger, would hardly be any element if he had to a week consider upon a risk or a danger with which he was already fully conversant. The learned trial judge further says that "when he was face to face with the situation, that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of

the danger known to him and apparent, he is guilty of contributory negligence." The Supreme Court of the State of Pennsylvania, however, has said that even though the employee was fully aware of the danger threatening and if the risk or danger did not threaten imminent or immediate injury, so that a following of the employer's instructions would not mean certain injury, that then if the employee overruled his better judgment and followed the instructions of his superior and injury followed, that he could not be held guilty of contributory negligence as a matter of law. It was for the jury to decide whether the danger impending was so imminently and irrestibly threatening that a reasonably prudent man should have known that an obedience to orders would be followed by certain injury. The following cases decided by the Supreme Court of Pennsylvania, the highest appellate court in the State, clearly show that the instructions as given by the trial judge were erroneous.

The rule was clearly laid down by the Supreme Court of the State of Pennsylvania in Glew *vs.* Pittsburgh Railways Company, 234 Pa., 238, where Glew, a motorman in the employ of the defendant company, was engaged to run a freight car whenever and wherever directed by the superintendent of the defendant's supply department; that on the day of the accident he was instructed to run his car with a load of old wheels on board, and pulling a gondola car loaded with coal behind, over a certain line, the tracks of which were out of repair; that the plaintiff suggested this fact to the superintendent, or his representative, and said that it was dangerous to run the kind of load that he was hauling over these tracks, when he was told that he should proceed to do as he was ordered or he "would learn what would happen to him;" that he carried out the directions of the superintendent, and while on the

line the tracks separated, causing the gondola car to drop down and break an axle, with a resulting shock to the freight motor car which displaced the old car wheels and caused one of them to fall upon and injure the plaintiff. The plaintiff admitted on cross-examination that he knew that the tracks were in a dangerous condition; that he protested against running his cars baded as they were on those tracks, but stated that the superintendent, or his representative, insisted on him doing what he did. On page 242 of the opinion, which was adopted by the Supreme Court, the Court expressly held as follows:

> "It struck us at the trial, and does yet, that the Court would have erred had it said as a matter of law that the platintiff was guilty of contributory negligence.
>
> "The fact that the person injured was aware of the danger is not sufficient to render him guilty of contributory negligence as a matter of law, but the question should be submitted to the jury. 29 Cyc. 640."
>
> "Again, it is clear from the testimony as we view it, that the plaintiff did not voluntarily run his car over this dangerous track. He did it upon the order of the superintendent of the department in which he was working, the vice-principal of the defendant, and the jury was the proper tribunal to say whether he had a right by that order to infer that the superintendent thought he could safely pass over the tracks, and if that inference was justifiable, to also say that the plaintiff, as employee, trusted to the judgment of his superior. If that were the case, then the true rule would be that laid down by Mr.

Justice Mestrezat in Willimas *vs.* Clarke, 204 Pa. 416, which we gave to the jury for their guidance and which reads as follows: 'We think the facts in this case bring it within the well recognized rules laid down in the test books and in our own decisions. The true rule in this case, as in all other cases, is that if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous.' "

It will be noticed that the facts in our case are strikingly similar to Glew *vs.* Pittsburgh Railways Company, *supra*, as appears from the following extract of testimony:

By Mr. Pritchard:

"Q. Why were you afraid?

A. I saw that stone was a large one, and I was afraid to put my arm under it.

Q. What were you afraid of?

A. I was afraid to put the piece of iron under.

Q. What were you afraid woud happen?

A. The rock was like to fall on my arm.

Q. Did you tell Humphrey Davis you wanted to go after something to shove under it'?

A. Yes, I told him, and he told me, 'Go ahead and put under the stile; put under the stile.'

Q. Just give the words that you used as near as you can recollect them.

A. Get him something to pút in the stile.

Q. Please repeat, as near as possible, just what you said to Humphrey Davis. Use the words as nearly as you can recollect them.

A. That is all Humphrey Davis said, 'Go ahead, go ahead.'

By the Court:

Q. Mr. Pritchard is asking you now what you said to Humphrey Davis, your exact words.

A. Get something for to put in the stile, on the block.

By Mr. Pritchard:

Q. What had you usually used before to put the wedge under?

A. I was using sometimes a hook and also the shovel." (Transcript of Record, pages 23–24).

The Superior Court of the State of Pennsylvania, in the case of Franczak *vs.* Nazareth Cement Company, 42 Pa. Super Ct. 263, laid down the same rule where a workman was hurriedly attempting to cross a track to avoid an approaching car and was directed by the foreman to stop and remove a stone on the track, with the assurance from the foreman that there was plenty of time for him to do so and get away, but while performing the work directed by the foreman he was injured, and it was held that:

> "A servant is not required to act on his own judgment against that of his employer, and if the latter give him positive instructions to go on with a particular task, he may recover for any injury received if the work is not imminently dangerous."

A case presenting almost similar facts is the case of Moleskey *vs.* South Fork Coal Mining Co., 247 Pa. 434, which was a case where an employee in a mine complained to the superintendent of the danger from a threatened fall of rock forming part of the roof of the mine heading, and that the latter, after testing the roof with a pick, assured the plaintiff that it was safe and instructed him to proceed with the work. The Court was asked to hold as a matter of law that because the plaintiff knew of the threatened danger and had complained of it to the mine superintendent, that he was gulity of contributory negligence and the Court should so instruct the jury as a matter of law. The Court submitted the question to the jury, and on an appeal the Supreme Court, in an opinion by Mr. Justice Elkins, said:

> "A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may under some circumstances rely upon their advice and still more upon their orders, notwithstanding misgivings of his own."

Mr. Justice Elkins further, in commenting upon the elements which must be considered by the jury when he is acting under the express instructions of the foreman stated as follows:

> "Even the rule as thus stated is subject to the qualification that the servant is not warranted in

proceeding with his work, if it was inevitably and immediately dangerous to do so, but what tribunal shall determine whether the work was inevitably and imminently dangerous? This necessarily depends upon the facts. It is sometimes for the Court and sometimes for the jury. In the present case, plaintiff had misgivings about the falling of the rock from the roof of the heading, but he was not sure about it, and sent for the superintendent for the purpose of calling his attention to what he apprehended might be an impending danger. When the superintendent assured him that the rock would not fall and ordered him to proceed with the work he obeyed his instructions. Was he justified as a man of common prudence in acting upon the judgment of the superintendent under these circumstances? Was the danger so obvious and imminent as to make it his duty to refuse to continue work when directed to proceed by the superintendent? Appellant argues that appellee admitted on the witness stand that he knew the danger was imminent and by his own admission is precluded from recovering damages in this action. But in this connection we must consider all of his testimony, in order to understand what he meant by the word 'imminent,' which was used by counsel in asking the question and not by the witness in answering it. The explanation of the witness was that while he had misgivings about the safety of the overhanging rock, he concluded after the superintendent sounded the same with his pick and assured him it would not fall it was safe for him to continue work. That this was a truthful statement was shown by the fact that he did continue to perform the work he was directed to do. He did not know that the rock would fall, and perhaps no one,

not even the superintendent, could have determined definitely in advance what would happen, Under all the circumstances of this case we cannot declare as a matter of law that plaintiff was so clearly guilty of contributory negligence as to preclude a recovery. This was a question for the jury and it was so submitted in a careful and painstaking charge by the learned trial Judge. Ample authority for this position will be found in the following cases: Patterson *vs.* Railroad Co., 76 Pa. 389; Williams *vs.* Clarke, 204 Pa. 416; Glew *vs.* Railways Co., 234 Pa. 238; Collins *vs.* Coal Co., 241 Pa. 55."

We, therefore, respectfully submit that not only did the Circuit Court of Appeals err in affirming the opinion of the Court below as to the instructions given, but also erred in sustaining the giving of instructions by a trial Judge not in open court, not in the presence of counsel, nor with the consent of counsel or their clients. It will once for all subject the jury to an influence which the people as a whole thought could not exist, that is, the giving of secret instructions when neither they nor their counsel are present so that they can hear what is said to the jury, and it once for all destroys the tradition that a trial is to be held in open court from beginning to end. A litigant who has lost his case, when the trial Judge himself confessed in the opinion on the motion for a new trial "That the practice here adopted does not deserve encouragement," and this criticism is followed by the opinion of the Circuit Court of Appeals upholding the act of the trial Judge in as doubtful language as this: "We do not say that harm could never happen in the exchange of such a question and answer; the variety and complexity of human affairs are so great that the same act may have a different quality if the atmosphere be different

that surrounds it; but so far as we can see, harm is not probable. We agree fully that modifications of established practice should be allowed with caution, and we see excellent reasons why every step in a trial up to the rendering of the verdict should be taken in open court, and (wherever practicable) in the presence of counsel also." We are at a loss to understand just what is meant by the learned ~~trial~~ judge's distinction by saying that the "same act may have a different quality if the atmosphere be different that surrounds it." We assume and have been taught to assume that the atmosphere surrounding a court of justice is the same in Maine as in California, and should be the same in Pennsylvania. And if this practice is dangerous in some atmospheres in a court of justice, it might even become dangerous in the State of Pennsylvania.

Respectfully submitted,

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